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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1966

No. 92

ROLAND CAMARA,
*Appellant,*
vs.
MUNICIPAL COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,
*Respondent.*

**On Appeal from the Judgment of the District Court of Appeal, State of California, First Appellate Division**

## APPELLANT'S OPENING BRIEF

### OPINION BELOW

The opinion of the District Court of Appeal is reported in 237 Cal.App.2d 128, 46 Cal.Rptr. 585 (1965), and is reproduced on pages 60-71 of the printed record. The order of the Superior Court denying the writ of prohibition is unreported and is reproduced on page 27 of the printed record.

## JURISDICTION

The judgment of the District Court of Appeal was filed on September 22, 1965. (R. 60.) A timely petition for hearing before the Supreme Court of California was denied on November 16, 1965, with Justices Peters and Peek voting for a hearing. (R. 72.) Notice of appeal was filed in the District Court of Appeal on December 20, 1965. (R. 73.) On October 10, 1966, this Court noted probable jurisdiction and ordered the case placed on the summary calendar. (R. 96.)

The jurisdiction of the Supreme Court of the United States to review the decision below is conferred by Title 28, United States Code, Section 1257(2).

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## STATUTES INVOLVED

Section 503 of the San Francisco Municipal Housing Code provides:

> "Right to Enter Building. Authorized employees of the City Departments or City agencies, so far as may be necessary for the performance of their duties, shall, upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed upon them by the Municipal Code."

Section 507 of the Code provides:

> "Penalty for Violation. Any person, the owner or his authorized agent who violates, disobeys, omits, neglects, or refuses to comply with, or who resists or opposes the execution of any of the provisions of this Code, or any order of the Su-

perintendent, the Director of Public Works, or the Director of Public Health made pursuant to this Code shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars ($500.00), or by imprisonment, not exceeding six months or by both such fine and imprisonment, unless otherwise provided in this Code, and shall be deemed guilty of a separate offense for every day such violation, disobedience, omission, neglect or refusal shall continue. * * *."

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## QUESTIONS PRESENTED

### I

Whether Section 503 of the Housing Code of the City and County of San Francisco, authorizing City employees to inspect private dwellings such as appellant's without warrant or probable cause for such inspections, and Section 507 of the Housing Code making refusal of such inspections a crime, are unconstitutional as authorizing unreasonable searches in violation of the Fourth and Fourteenth Amendments.

### II

Whether Sections 503 and 507 of the Housing Code violate the First, Fourth, Fifth, Ninth and Fourteenth Amendments by allowing a search for evidence without warrant, arrest or emergency.

## STATEMENT OF FACTS

Appellant is charged in the Municipal Court of the City and County of San Francisco, State of California, with a misdemeanor on the basis of a written complaint charging that on November 22, 1963, he violated Section 507 of the San Francisco Municipal Housing Code by refusing a public health inspector entry into his dwelling for the purpose of making an inspection under the provisions of Section 503 of the Code. (R. 5.)

Section 503 of the San Francisco Municipal Housing Code authorizes city employees in the performance of their duties at reasonable times to enter any building, structure or premises in San Francisco. Section 507 makes it a criminal act to resist or oppose any provision of the Housing Code. Neither a warrant nor probable cause is necessary to allow a city employee to demand entry into one's home under Section 503. And if a resident refuses entry to the city employee into his home, the resident faces a criminal charge under Section 507 despite the absence of either a warrant or probable cause.

On November 6, 1963, Inspector Nall of the Division of Housing Inspection of the Department of Public Health of San Francisco entered the premises at 225 Jones Street, an apartment house. (R. 1-2.)[1] The inspector claimed the existing permit of occupancy did not allow residential use on the ground floor. (R. 18.)

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[1]This statement of the events which occurred is based upon the facts pleaded in the Petition for Writ of Prohibition (R. 1-4) and the Answer to the petition (R. 18-20). Only those facts admitted by respondent (either expressly or by failure to deny) or alleged by respondent are set forth.

The purpose of the inspector's presence was to make a routine annual inspection of apartment houses for the purposes of licensing and issuing a permit of occupancy. (R. 19.) Nall learned from the building manager that appellant leased the store on the ground floor of the building and lived in the rear. Nall questioned appellant, who readily admitted such occupancy. (R. 1, 18.) Nall requested permission to inspect appellant's apartment, but appellant declined to let him enter when he learned that Nall did not have a search warrant. (R. 2, 19.)

Nall returned to the premises on November 8, 1963, and appellant again declined to allow him entry to inspect. (R. 19.)

Subsequent to November 8 a notice was mailed to appellant at 223 Jones Street requesting him to appear at the office of the District Attorney on November 22 as to a violation of Section 507.

On November 22, Nall returned to the premises with Inspector John M. Reid. They did not have a warrant or written complaint. (R. 2, 20.) Reid told appellant that it was the responsibility of the Department of Public Health to ensure conformance with the Housing Code and with the existing occupancy permit. He also informed appellant that the building where appellant lived could not have a dwelling on the ground floor and so it was illegal for appellant to occupy the ground floor as a residence. Reid again requested permission to inspect appellant's dwelling and appellant again declined to give permission to enter. (R. 20.)

The inspectors did not have a warrant or written complaint on any of these occasions. At all times appellant readily admitted that he resided on the ground floor. No reason for inspecting appellant's residence was given other than his occupancy, which appellant admitted.[2] No emergency was involved. There was ample time between November 6th and November 22nd to obtain a search warrant (if the situation required it) or to serve an eviction notice (if the law required it). But the inspectors demanded the right to enter and search.

Appellant was arrested on December 2, 1963, after the filing of a complaint charging him with violation of Section 507 because of his refusal on November 22, 1963, to allow an inspection of his home as authorized by Section 503. (R. 3, 5-6.)

A demurrer to the complaint was filed in the Municipal Court (R. 7-8) where the action was to be tried, but that Court ruled that Section 503 was constitutional and set the matter for trial. Appellant applied for a writ of prohibition in the Superior Court and in doing so raised the constitutional issues involved in this appeal.[3] (R. 3-4, 9-16.) An alternative writ of prohibition was issued requiring the Municipal Court

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[2]Whether or not appellant's residence was in fact legal for occupancy as an apartment is of no relevance here. Neither appellant nor his landlord have ever been charged with failure to abide by a permit of occupancy. If the occupancy was illegal, nothing in the interior of the apartment could change that fact.

[3]In California, a trial court lacks jurisdiction to proceed with the trial of a criminal case if the statute allegedly violated is unconstitutional and this matter is called to its attention. *Whitney v. Municipal Court*, 58 Cal.2d 907, 911 (1962).

to show cause why the prosecution should not be prohibited. (R. 16-17.) The issues raised by this appeal were argued orally at the hearing for the permanent writ of prohibition. (R. 30-60.) The trial Court denied the permanent writ and the alternative writ was dissolved on the express ground that section 503 was not unconstitutional. (R. 27.) An appeal from the judgment of the trial Court was taken to the District Court of Appeal. The latter Court affirmed the decision of the Superior Court and in doing so expressly ruled that the ordinances involved did not violate the Fourteenth or Fourth Amendments. (R. 60-71.) A petition for a hearing before the Supreme Court of California was denied, with two Justices dissenting. (R. 72.)[4]

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## SUMMARY OF ARGUMENT

The Fourth Amendment provides for "the right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures . . . ." This protection is applicable to State action as well as federal action. *Mapp v. Ohio,* 367 U.S. 643, 6 L.ed.2d 1081 (1961). In the absence of an emergency, this protection includes the necessity of a search or arrest warrant before one's home may be entered by a governmental official without consent. *Weeks v. United States,* 232 U.S. 383, 58 L.ed. 652 (1914); *Agnello v. United States,* 269 U.S. 20, 70 L.ed. 145 (1925); *Sil-*

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[4]The trial of the case is awaiting the outcome of this appeal and it is conceded that if Section 503 of the Housing Code is not unconstitutional, appellant has no defense. This concession was noted in the opinion of the District Court of Appeal, R. 61.

*verman v. United States,* 365 U.S. 505, 5 L.ed.2d 734 (1961). The decision in *Frank v. Maryland,* 359 U.S. 360, 3 L.ed.2d 877 (1959) removes this security by allowing a health inspector the authority to demand entrance to one's home without a warrant. That case failed to interpret properly the history leading to the Fourth Amendment or the broad meaning given to that Amendment by other decisions of this Court. The *Frank* decision should be overruled. The justification for the exception created for health inspectors in that case, the importance of protecting the public health, is inadequate and unavailing in the face of the guarantees of the Fourth Amendment.

Alternatively, only if the Court is unwilling to overrule *Frank v. Maryland,* the decision below should be reversed because the ordinance under which the inspector sought entrance does not even require that he have probable cause to justify his search or the criminal penalty for resistance to the search.

This case also raises the issue of whether *Frank v. Maryland* is compatible with *Griswold v. Connecticut,* 381 U.S. 479, and whether the latter case has not overruled *Frank* as well as other previously authorized invasions of the right of privacy such as the wire tapping case, *Olmstead v. United States,* 277 U.S. 438.

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**ARGUMENT**

"To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which

> no Englishman would wish to live an hour; it was the most daring public attack made on the liberty of the subject."
>
> The Lord Chief Justice on "The North Briton" affair in *Huckle v. Money,* 95 Eng. Rep. 768 (1763).

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## I

**TO ALLOW AN ADMINISTRATIVE OFFICIAL TO ENTER A PRIVATE HOME WITHOUT A WARRANT, IN THE ABSENCE OF CONSENT OR AN EMERGENCY, IS TO VIOLATE THE SECURITY PROTECTED BY THE FOURTH AND FOURTEENTH AMENDMENTS.**

### 1. Searches of homes without a warrant are unreasonable in the absence of consent or emergency.

This Court has long recognized that the provisions against unreasonable search in the Fourth Amendment are fundamental constitutional protections and that basic among these protections is the privacy of one's home against governmental intrusion without a search warrant. E.g., *Weeks v. United States,* 232 U.S. 383, 58 L.ed. 652 (1914); *Agnello v. United States,* 269 U.S. 20, 70 L.ed. 145 (1925); *Silverman v. United States,* 365 U.S. 505, 5 L.ed.2d 734 (1961). The constitutional protection is so strong that a search warrant is required even though the official seeking to search has in his possession facts which unquestionably show probable cause that the search is justifiable. *Agnello v. United States,* 269 U.S. at 33, 70 L.ed. at 149. The values thus protected are described in *McDonald v. United States,* 335 U.S. 451, 453, 93 L.ed. 153, 157 (1948):

> "This guarantee of protection against unreasonable searches and seizures extends to the innocent and guilty alike. It marks the right of privacy as one of the unique values of our civilization and, with few exceptions, stays the hands of the police unless they have a search warrant issued by a magistrate on probable cause supported by oath or affirmation."

Factors which can make a warrantless search reasonable, namely, emergency circumstances (*Carroll v. United States,* 267 U.S. 132, 153, 69 L.ed. 543, 551), free consent (*Zap v. United States,* 328 U.S. 624, 90 L.ed. 1477), or incidental to a lawful arrest (cf. *United States v. Rabinowitz,* 339 U.S. 56, 94 L.ed. 653 (1950), with *Trupiano v. United States,* 344 U.S. 699, 92 L.ed. 1663 (1948)) are not present here, nor were they present in *Frank v. Maryland.*

The constitutional protection applies not only to federal officials under the Fourth Amendment but is also enforceable against the States through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio,* 367 U.S. 643, 6 L.ed.2d 1081 (1961).

**2. The law declared in Frank v. Maryland breaches the security of the home meant to be protected by the Fourth Amendment.**

The Fourth Amendment protects "the right of the people to be *secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ."

The security of the people against unreasonable searches was breached by the decision of *Frank v.*

*Maryland,* 359 U.S. 360, 3 L.ed.2d 877 (1959). By a vote of 4-1-4, this Court upheld the conviction of the defendant for his refusal to allow a health inspector to enter his home in the absence of a search warrant. The explanation given by the main opinion in *Frank* was that the thrust of Fourth Amendment prohibition of unreasonable searches and seizures was directed towards implementing the provisions of the Fifth Amendment prohibiting self-incrimination in a criminal case. Therefore, since an attempted search by a health inspector is not part of a criminal proceeding, the constitutional protection was not available. 359 U.S. at 365-66, 3 L.ed.2d at 881-82.

This interpretation of the Fourth Amendment is incompatible with its historical development and with the decisions of this Court interpreting that Amendment. *Frank v. Maryland* should be overruled. It gravely weakens the Fourth and Fourteenth Amendments by failing to protect the security of the individual from the intrusion into his home of a host of state and local officials for a myriad of reasons. "The Court has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by its Framers when they added the Amendment to our constitutional scheme." *Malloy v. Hogan,* 378 U.S. 1, 5, 12 L.ed.2d 653, 657 (1964).

The history of the events leading to the adoption of the Fourth Amendment shows that the evil to be prevented was not limited to searches to obtain

evidence for criminal proceedings, but extended to all instances of governmental intrusion into one's home. The Court is already familiar with the historical development of the Fourth Amendment from its own decisions.[5] This brief presents the more significant illustrative episodes.

Certainly the landmark decision concerning the protection of one's home from intrusion is *Entick v. Carrington,* 19 Howell's St. Tr. 1029 (1765). This was a civil action for trespass by Entick, a publisher, against certain governmental officials who under authority of a general warrant entered his establishment and seized his private papers. The warrant failed to specify the papers to be seized. The decision of Lord Camden in awarding damages for trespass is couched in terms of protecting the security of one's property. ". . . every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license but he is liable to an action though the damage be nothing * * *" This opinion was described thusly by Justice Bradley, speaking for the Court:[6]

> "The principles laid down in this opinion affect the very essence of constitutional liberty and

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[5] *Boyd v. United States,* 116 U.S. 616, 625-630, 29 L.ed. 746, 749-51 (1886); *Marcus v. Property Search Warrant,* 367 U.S. 717, 724-729, 6 L.ed.2d 1127, 1132-35 (1961); *Stanford v. Texas,* 379 U.S. 476, 481-484, 13 L.ed.2d 431, 434-36 (1965). See also, e.g., Landynski, *Search and Seizure and the Supreme Court,* 19-48 (1966); Barrett, "Personal Rights, Property Rights, and the Fourth Amendment," 1960 Sup. Ct. Rev. 46, 70-71; Note, 15 Buffalo L. Rev. 456 (1966).

[6] *Boyd v. United States,* 116 U.S. 616, 630, 29 L.ed. 746, 751 (1886).

security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life."

In the many debates in the American colonies over the arbitrary nature of use of writs of assistance and general warrants to sanction the search of private establishments, the language is clear that all types of intrusions, not merely those to obtain criminal evidence, are condemned. In the 1761 debates as to whether the colonial court in Massachusetts had the authority to issue writs of assistance, James Otis is reported to have said in substance that the writ "is against the fundamental principles of law, the privilege of the house. A man who is quiet is as secure in his home as a prince in his castle, notwithstanding all his debts and civil procedures of any kind."[7] When later Patrick Henry opposed the adoption of the Constitution without a Bill of Rights he contended that otherwise "excisemen . . . may . . . go into your cellars and rooms, and search, ransack, and measure, every thing you eat, drink, and wear."[8]

These examples show that the concern of the Great Debates of the Eighteenth Century over the authority of government to search private homes and seize

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[7]As quoted from the notes of John Adams in Landynski, *Search and Seizure and the Supreme Court* 34 (1966). A similar statement appears in Barrett, "Personal Rights, Property Rights, and the Fourth Amendment," 1960 Sup. Ct. Rev. 46, 71.

[8]Elliot, *Debates* 448-49, as it appears in Barrett, *id.* at 71.

private papers was directed against *all* such situations, not merely those where evidence for a criminal trial was being sought. As Dean Barrett of the School of Law of the University of California at Davis has stated, these men "were primarily interested in protecting the homes of ordinary persons against indiscriminate and unreasonable governmental invasions. They did not regard the great issue of liberty to be protection against searches for evidence to be used in criminal prosecutions."[9]

The broad language used by decisions of this Court prior to *Frank v. Maryland* carried forward this historical tradition and understanding. In the first significant decision concerning the Fourth Amendment, *Boyd v. United States,* 116 U.S. 616, 630, 29 L.ed. 746, 751 (1886), the Court stated that the protections against unreasonable searches and seizures "apply to all invasions on the part of government and its employees of the sanctity of a man's home and privacies of life." The landmark case of *Weeks v. United States,* 232 U.S. 383, 391-92, 58 L.ed. 652, 655 (1914), holds:

> "The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, *whether accused of crime or not,*

[9]Barrett, *id.* at 71.

> and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws." (Emphasis added.)

In *Federal Trade Comm'n v. American Tobacco Co.*, 264 U.S. 298, 307 (1924), the Court carefully narrowed the investigative scope of a federal regulatory statute in order to avoid a violation of the Fourth Amendment. The Court in *Agnello v. United States*, 269 U.S. 20, 32, 70 L.ed. 145, 149 (1925), stated: "The search of a private dwelling without a warrant is *in itself* unreasonable and abhorrent to our laws."[10] And *Davis v. United States*, 328 U.S. 582, 90 L.ed. 1453 (1946), stated:

> "It [the law of searches and seizures] reflects a dual purpose—protection of the privacy of the individual, his right to be let alone; protection of the individual against compulsory production of evidence to be used against him." [328 U.S. at 587.]

And then came *Frank v. Maryland*, representing, in the words of Dean Barrett, "a startling reversal of position."

Fortunately, decisions of this Court since *Frank* have not accepted this reversal of position. They have continued to recognize the broad scope of the constitutional protection against unreasonable searches and seizures. In *Mapp v. Ohio*, 367 U.S. 643, 657, 6 L.ed.

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[10]Emphasis added. See also *Neuslein v. District of Columbia*, 115 F.2d 690, 692-93 (D.C. Cir. 1940), for a valuable discussion on this point.

2d 1081, 1091 (1961), the Court remarked that the purpose of both the Fourth and Fifth Amendments, "complementary to, although not dependent upon, that of the other", is " 'to maintain inviolate large areas of personal privacy.' " In *Marcus v. Property Search Warrant,* 367 U.S. 717, 724-29, 6 L.ed.2d 1127, 1132-35 (1961), it was pointed out that unreasonable searches were forbidden by the Fourth Amendment not only to prohibit the collection of evidence to be used to incriminate; but also to prohibit the suppression of public expression—a ground independent of the Fifth Amendment. In *Stanford v. Texas,* 379 U.S. 476, 13 L.ed.2d 431 (1965), the Court reviewed once again the antecedents and application of the Fourth Amendment and reaffirmed that its broad purpose was to assure that the people of this Nation are " 'secure in their persons, houses, papers and effects.' " The Court did not limit this security to criminal affairs. On the contrary, the strength of the decision is in the refusal of the Court to allow the unreasonable search to be an instrument of political oppression.[11]

We submit that the time is now proper for this Court to repudiate the special and restrictive exceptions to the guaranties of the Fourth Amendment

[11] "No less a standard could be faithful to First Amendment freedoms." 379 U.S. at 485; 13 L.ed.2d at 437. In *Stanford* the defendant was convicted of a violation of the anti-Communist legislation of the State of Texas. The search warrant issued was so sweeping in its language that it was no warrant at all under the Fourth and Fourteenth Amendments. The quantity of defendant's books, writings and other documents seized without legal warrant illustrates the obvious attempt to stifle the defendant's right to speak and otherwise communicate.

carved out for "inspectors" in *Frank v. Maryland* and to prevent State courts from derogating the protections of the Fourth Amendment by relying upon the Frank decision.[12] In this way the Court can secure its recent statement that:

> "The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[13]

It may be that the decision in *Frank* can be explained as a distinction drawn between the security provided by the Fourth Amendment and the security provided by the Fourteenth Amendment. When the *Frank* decision came down, *Wolf v. Colorado,* 338 U.S. 25, 93 L.ed. 1782 (1949), allowed such a distinction as to the application of the exclusionary rule. Now *Mapp v. Ohio,* 367 U.S. 643, 6 L.ed.2d 1081 (1961), has overruled *Wolf* and brought to bear against the *Frank* decision the full weight of the historical development of the Fourth Amendment as a protection of privacy against all warrantless intrusions.[14]

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[12]See text at note 28, *infra.*

[13]*Silverman v. United States,* 365 U.S. 505, 511, 5 L.ed.2d 734, 739 (1961).

[14]See also *Aguilar v. Texas,* 378 U.S. 108, 12 L.ed.2d 723 (1964) discussing the effect of the *Mapp* decision.

**3. To grant immunity to the "inspector" from the requirement of a seach warrant is both improper and unnecessary.**

The claim that the requirement of a search warrant was not necessary in a health inspection of one's home was answered in a Circuit Court decision antedating *Frank v. Maryland, District of Columbia v. Little,* 178 F.2d 13 (D.C. Cir. 1949); *affirmed on other grounds,* 339 U.S. 1, as follows:

> "To say that a man suspected of a crime has a right to protection against search of his home, without a warrant, but that a man not suspected of a crime has no such protection, is a fantastic absurdity."[15]

This anomalous consequence, which became law in the *Frank* case, was also commented upon by Dean Barrett:

> "[As a result of *Frank v. Maryland*] those types of governmental invasions of privacy most likely to involve the law-abiding person are subjected to the least restraint, those directed primarily against persons suspected of crime to the greatest."[16]

Another example of the peculiar distinctions to be drawn as a result of *Frank v. Maryland* is illustrated by *People v. Laverne,* 14 N.Y.2d 304, 200 N.E.2d 441 (1964). Under authority of an ordinance allowing the

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[15]178 F.2d 13, 17 (D.C. Cir. 1949).

[16]Barrett, "Personal Rights, Property Rights, and the Fourth Amendment," 1960 Sup.Ct.Rev. 46, 71-72. Needless to say, neither Dean Barrett nor appellant argues that an acceptable cure for this anomaly is to reduce the protection accorded to those suspected of criminal violations to the level of those not suspected of crimes under the *Frank* holding.

inspection of private dwellings without a warrant, a health inspector inspected the defendant's home and found violations of the health laws. The defendant was convicted of these violations. Obviously constrained to an obedience to the *Frank* decision—and disturbed by it—a divided New York Court of Appeals nevertheless found a way to reverse the conviction. It found a distinction in that *Frank* was not concerned with the question of conviction of the health ordinance violation for which the inspector purports to be seeking. The court therefore ruled that the evidence obtained in a health inspector's search without a warrant could not be used to obtain a criminal conviction. Such a distinction certainly gives municipal authorities a peculiar choice. If a city uses the freedom of action that *Frank* offers to enforce its health laws, it cannot punish the violations which are discovered or coerce their correction by threat of criminal conviction.

Is there rational ground for a difference in search warrant requirements depending upon whether the municipal official making the search is a police officer or a health inspector? Certainly the requirement of the warrant is not meant to prevent a proper search. The interposition of a magistrate in determining whether a search (or inspection) should be allowed is not to deny a proper search, but it is merely to determine whether the circumstances for a proper search exist. What the Constitution does is to enjoin that the official who desires to make the search should not himself have the authority to determine whether it is

proper.[17] If in fact probable cause exists for the search or inspection, the judicial officer will allow it to proceed. *Johnson v. United States,* 333 U.S. 10, 13-14, 92 L.ed. 436, 440 (1948); *McDonald v. United States,* 335 U.S. 451, 455-56, 93 L.ed. 153, 158 (1948).

The argument presented for eliminating this judicial protection is one of utility. It is claimed that evidence of health violations may only be discoverable upon internal inspection of houses. It is claimed that to protect the public health large municipal areas must be regularly inspected without individual probable cause thus making warrants unobtainable on an individual basis. What is desired is a statutory general warrant for every home in the area to be searched.

Arguments of utility have been frequently made in attempts to overcome constitutional protections, but they are just as frequently rejected. Lord Camden himself in *Entick v. Carrington* found no force in the argument that a general warrant is a great assistance in convicting criminals, noting that it was not allowed in crimes more heinous than seditious publication. This Court also has refused to accept such an argument. It certainly simplifies police work if, for example, the policeman is not required to inform the accused of his right to remain silent and to have counsel, and yet this Court has required that such information be given. *Miranda v. Arizona,* 384 U.S.

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[17] "The constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case." *Stanford v. Texas,* 379 U.S. 476, 485, 13 L.ed.2d 431, 437 (1965).

436, 16 L.ed.2d 694 (1966). There is no doubt that more criminals would be convicted if the Constitution allowed every home to be searched and the evidence which was turned up to be used against the accused. See *Weeks v. United States,* 232 U.S. 383, 58 L.ed. 652 (1914); *Mapp v. Ohio,* 367 U.S. 643, 6 L.ed.2d 1081 (1961). Similarly, it would be "easier" if federal law enforcement officials could rely on evidence gathered by state officials, even if illegally; this "silver platter" doctrine has been rejected by this Court. *Elkins v. United States,* 364 U.S. 206, 4 L.ed.2d 1669 (1960).

We submit that the factors motivating the courts to advance the exclusionary rule and to reject the "silver platter" doctrine in order to protect the privacy of the home are equally involved in determining that the health inspector, as well as the police officer, should have a search warrant before he attempts to enter the home.

In addition, it has never been demonstrated that the protection of the public health requires casting aside this guarantee against improper governmental intrusion into one's home. If the health inspector must carry on an areawide survey, it would seem from the paucity of cases involving resistance that most of the residents of the area welcome him. In those situations where the occupant will not allow him to enter, will not in almost all instances an inspection of the exterior, complaints from neighbors or the process of elimination of other causes of a specific effect show grounds upon which a search warrant could issue?

In the instant case, for example, there was no need for a warrantless search to determine if the health laws had been violated. Information obtained from the building manager, from public documents, and from appellant himself established the facts which were the alleged justification for the demand to search. (R. 1, 18.) The record in *Frank* itself is equally clear that a visual inspection of the outside of the premises disclosed facts upon which a search warrant could have been issued. However, in both these cases the government official *still* sought entrance into the home without judicial approval.

What remains is that small number of situations in which, especially in an areawide inspection *in which no one is even suspected* of a health violation, a home might contain a violation which is otherwise undiscoverable because the occupant insists on privacy. If it is here where we must choose, then the proper choice is with the Constitution and not against it. The "right of the people to be secure in their . . . houses," which right includes the protections of a search warrant, should prevail.

It is avoiding the issue to justify a search under these circumstances without a warrant by referring to the "reasonableness" of officials guarding public health in urban areas. Crime itself constitutes a hazard in urban areas and yet search warrants are required. As four Justices stated in *Frank v. Maryland,* 359 U.S. 360, 382, 3 L.ed.2d 877, 891 (1959) (dissent):

"One invasion of privacy by an official of government can be as oppressive as another. Health inspections are important. But they are hardly more important than the search for narcotic peddlers, rapists, kidnappers, murderers, and other criminal elements. * * *"

**4. Administrative searches, if left free of constitutional restrictions, could subvert the Fourth Amendment.**

Whether a warrant should be required before a administrative search, without consent, may take place is increasingly important in our society today. Searches for evidence of crime must compete with searches for untaxed imports, with searches by health inspectors seeking to protect the public health, and with searches by zoning inspectors seeking to conform land use. The welfare official may seek entrance to determine if the public assistance laws are being followed or children are being properly cared for or educated. Will not the tax assessor follow suit to determine whether personal property is being reported? Who else will follow him?[18] In each case the privacy of one's home is diluted and additionally threatened. If indeed "the right of privacy" is "one of the unique

[18]Instances of administrative searches, including situations of cooperation of administrators and police, are presented in several sources: E.g., *State v. Pettiford*, 28 U.S. Law Week 2286 (Dec. 29, 1959) (see note 21, *infra*); *Parrish v. Board of Supervisors*, 242 A.C.A. 665 (1966); Reich, "Midnight Welfare Searches and the Social Security Act," 72 Yale L.J. 1374 (1963); Lassen, *The History and Development of the Fourth Amendment to the United States Constitution* 51 et seq. (1937); Comment, "State Health Inspections," 44 Minn.L.Rev. 513 (1960); Note, 25 Mo.L.Rev. 79 (1960).

values of our civilization"[19] and the protection against governmental intrusion concerns "the very essence of constitutional liberty and security,"[20] then surely this protection reaches all phases of governmental intrusion into the home.

Furthermore, as the extent of administrative searches increases, their immunity from the search warrant requirements will increase the temptation of the police to rely on administrators to search in situations where otherwise a search warrant would be required. ". . . the administrative officer who invades the privacy of the home may be only a front for the police who are thus saved the nuisance of getting a warrant." *Abel v. United States*, 362 U.S. 217, 242, 4 L.ed.2d 668, 688 (1960) (Douglas, J., dissent). Indeed, this very thing did occur in Maryland where a police officer was assigned to the Sanitation Division to gain entrance to a home to determine if gambling were going on.[21] It is this danger also which requires this Court to make clear that the administrative search also requires a warrant.

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[19] *McDonald v. United States*, 335 U.S. 451, 453, 93 L.ed. 153, 157 (1948).

[20] *Boyd v. United States*, 116 U.S. 616, 630, 29 L.ed. 746, 751 (1886).

[21] *State v. Pettiford*, cited in note 18, *supra*, and discussed in the dissent of Justice Douglas in *Abel*, 362 U.S. at 242-43, 4 L.ed. 2d 688. Although in that particular case the subterfuge was discovered and sanctioned, this example shows the serious type of problem caused by the *Frank* case.

## II

### EVEN IF A SEARCH WARRANT IS NOT CONSTITUTIONALLY REQUIRED FOR AN ADMINISTRATIVE SEARCH, THE ORDINANCE IN THIS CASE IS INADEQUATE FOR FAILING TO REQUIRE PROBABLE CAUSE.

We do not believe that the significant issues of this case can be met without coming to grips with *Frank v. Maryland*. As important as the existence of probable cause may be to support a search, the requirement is only meaningful if there is an independent magistrate to apply this standard upon the basis of sworn oral or written testimony. If a statute merely has a requirement of probable cause, but leaves it up to the health inspector to determine this, then one of the major protections under the doctrine of probable cause—the independent determination of its existence—is lost. See *Johnson v. United States*, 333 U.S. 10, 13-14, 92 L.ed. 436, 440 (1948); *McDonald v. United States*, 335 U.S. 451, 455-56, 93 L.ed. 153, 158 (1948). Certainly in criminal cases, "absent some grave emergency,"[22] searches without warrants "are held unlawful notwithstanding facts unquestionably showing probable cause." *Agnello v. United States*, 269 U.S. 20, 23, 70 L.ed. 145, 149 (1925). We submit the constitutional protection should not be any less in searches in other cases.

However, if this Court does not wish to overrule *Frank v. Maryland*, the decision below should be reversed because it extends the right of inspection beyond that allowed in *Frank*. The ordinance in *Frank*

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[22] *McDonald v. United States*, 335 U.S. 451, 455, 93 L.ed. 153, 158 (1948).

contained a requirement of probable cause before a search could be made, and Justice Whittaker in providing the fifth vote for the result of the main opinion stated clearly that the ground for his concurrence was that the evidence showed that there was probable cause to justify a search.[23]

In the instant case the applicable ordinance, section 503, does not contain a requirement that the inspector have probable cause before he demands the right to search the premises, and the highest State Court in this case approved this ordinance under such an interpretation.[24] Health inspectors in San Francisco, as long as they act "at reasonable times" and "in the performance of their duties,"[25] may demand entrance into the home even if they do not have any evidence of probable cause of a violation. On refusal, they may coerce entry by threat of criminal prosecution and obtain it as against the most determined resident by repeated convictions. Hence even the smallest protection for the resident has been eliminated.

Furthermore, on the facts of this case there was no probable cause to support a search of the premises. The investigation in this case was not to discover

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[23]See *Frank v. Maryland*, 359 U.S. 360, 373-74, 3 L.ed.2d 886 (1959) (Whittaker, J., concur.)

[24]See the opinion of the District Court of Appeal in the instant case. R. 66, 67. See also the statement by the Deputy District Attorney before the trial court that "under the wording of this statute, there need be no suspicion" to serve as the basis for an inspection. R. 32.

[25]S. F. Mun. H. Code sec. 503, R. 6. The duties of inspectors include seeking out possible violations. See, e.g., S. F. Housing Code sec. 501(b), R. 80.

some suspected but undetermined health hazard. Respondent's Answer filed in the trial Court shows that the investigation was at most to determine whether the ground floor of a particular apartment house was properly occupied.[26] The health inspectors believed it was zoned for commercial occupancy, not residential occupancy. Appellant *admitted* to the inspectors that he was residing in that portion of the building which they believed was zoned for commercial use only.[27] The insistence of the inspectors to search the premises was not for the purpose of determining whether there was an emergency hazard or even whether the law was being violated, but was only a gratuitous desire to rigorously assert their privilege under section 503.

Dictum in *Frank* has been relied upon to remove Fourth Amendment protection in cases in which the statute involved did not require probable cause. One such case was *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 4 L.ed.2d 1708 (1960), in which an equally divided decision of this Court affirmed the decision of the Ohio Supreme Court. The other decision was *St. Louis v. Evans*, 337 S.W.2d 948 (Mo. 1960). It should be noted, however, that in the *Evans* case the defendants were not occupants of the portion of the premises which the inspectors sought to enter.[28]

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[26]R. 18-20.

[27]See Answer to Petition for Writ of Prohibition (R. 19) and the opinion of the Court below (R. 61). See note 2, *supra*.

[28]*Givner v. State*, 210 Md. 484, 124 A.2d 764 (1956), also upheld the claim of a health inspector to search without the necessity of a warrant. However, in that case the applicable ordinance had a requirement of probable cause.

Therefore, even if *Frank* is to remain, at least this ordinance may not.

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## III

### WHETHER OR NOT THE FOURTH AND FOURTEENTH AMENDMENTS PROHIBIT WARRANTLESS ADMINISTRATIVE SEARCHES, THE RIGHT TO PRIVACY HAS BEEN VIOLATED IN THE CASE AT BAR.

The right to privacy as an independent constitutional doctrine binding on governments stands today as an unknown quantity; it lives in the Cartesian sense that it "is" (*Griswold v. Connecticut*, 381 U.S. 479); yet its substance and direction are not developed. It would be presumptuous of appellant to claim to know the limits or full content of the right to privacy, and yet it would not be wise to ignore a right which so obviously aids his case simply because the Court's decision might be placed on other grounds.

It is our belief that the right of privacy will keep its place as a necessary structural support for the life of freedom which is the product of the more specific guarantees of the Bill of Rights.[29] We do not detract from the wisdom of James Madison, Thomas Jefferson, John Adams and the other great American men

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[29] As Mr. Justice Douglas wrote in *Griswold v. Connecticut*, 381 U.S. 479, 482:

> The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

of the Eighteenth Century if we say that they were not able to see our age of flashing, geometric advances in the field of science. Each increase in man's power over his environment is an increase in man's power over other men. For this reason, the right of privacy —"to be let alone"—ought to be extended to secure the privacy of one's home and effects whether or not there is a technical violation of the Fourth Amendment, absent a grave emergency or a judicial determination that there is adequate cause for the breach of this privacy.

The wire tapping case, *Olmstead v. United States*, 277 U.S. 438, 72 L.ed. 944 (1928), gave birth to the idea that the Fourth Amendment is a protection against certain methods of invasions of privacy—trespasses—rather than securing the right itself. This concept has produced hair-splitting decisions such as the "spike mike" case, *Silverman v. United States*, 365 U.S. 505, 5 L.ed.2d 734 (1961). We believe these cases evade the issue, which is the security of the individual in his home, and that the *Olmstead* case ought to be overruled not only for the reasons stated in its justly famous and often cited dissenting opinions, but for the reason that it is incompatible with the concepts of security and privacy recognized as of constitutional dimension in *Griswold v. Connecticut*. The rule of *Frank v. Maryland* is equally incompatible with *Griswold*, since the latter case states:

> The Fourth and Fifth Amendments were described in Boyd v. United States . . . as protection against all governmental invasions "of the

sanctity of a man's home and the privacies of life". (381 U.S. at 484.)

See also the dissenting opinion of Mr. Justice Harlan in *Poe v. Ullman*, 367 U.S. 497, 550-551.

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## IV

### CONCLUSION

Because the San Francisco ordinances before the Court violate the constitutional protection of security of the person in his home, it is respectfully submitted that the judgment of the Court below should be reversed.

Dated, San Francisco, California,
December 1, 1966.

Respectfully submitted,

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